APPA

ORIGINAL

American Public Power Association

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EX PARTE OR LATE FILED

December 10, 1999

Ms. Magalie Roman Salas
Office of the Secretary
Federal Communications Commission
The Portals
445 Twelfth Street, SW
Eighth Floor
Washington, DC 20554

Re: Notice of *Ex Parte* Communications in Petition for Preemption of Section 392.410(7) of the Revised Statutes of Missouri;
CC Pol Docket No 98-122

Dear Secretary Salas:

On December 2, 1999, Jane Cirrincione, Ron Lunt and Richard Geltman of the American Public Power Association (APPA) participated in an *ex parte* meeting with Thomas C. Power, Senior Legal Advisor to Chairman Kennard, and Ellen Blackler, Special Assistant in the Common Carrier Bureau, staff of the Federal Communications Commission. During the meeting we discussed and provided documents about the Missouri preemption proceeding.

During the meeting with Mr. Power and Ms. Blackler, which lasted under forty minutes, the representatives of APPA made the following points:

- Public power utilities are community-owned, not-for-profit entities that are operated by a variety of local, regional and state units of government. Over 75% of municipally-owned electric utilities serve communities of less than 10,000 residents.

- Governmental entities respond to the demands of their citizens. Especially in rural areas, where advanced telecommunications services are unavailable, inadequate or over-priced, public power utilities have begun providing these services. However, there are eight states where barriers to entry impede municipal electric systems from offering these services.

- One of those states is Missouri where the state legislature has prohibited municipalities from offering certain telecommunications services. Missouri municipalities have petitioned the Commission to preempt this state law pursuant to Section 253(a) of the Telecommunications Act of 1996. And APPA supports the Missouri municipals in this endeavor.

- Municipalities and municipal electric systems need to be able to provide advanced telecommunications services so the digital divide between rural and urban communities, wealthy and distressed communities, does not expand.

- The FCC should quickly approve the Missouri municipals' preemption petition so that public power systems may begin offering needed services, additional state legislatures will not be persuaded by incumbent phone and cable interests to enact municipal barriers to entry when the legislatures reassemble in the new year, and political uncertainty about municipal authority will not discourage new investments.

- Despite the FCC's decision in the Abilene case and the DC Circuit Court of Appeals affirmance, the FCC has the authority to preempt the Missouri statute. The legislative history of Section 253(a) strongly supports that the FCC has the mandate to preempt state legislation which prevents municipal electric utilities from offering telecommunications services. This distinguishes the Missouri municipals case from the Abilene case, where the legislative history was not as clear for municipalities. Both the Commission and the DC Circuit Court of Appeals recognized the difference in Congressional treatment of municipal electric utilities and municipalities.

- The electricity industry, both investor-owned and municipally-owned, has both the capability and desire to diversify into the advanced telecommunications service area. Municipal power agencies are more than potential service providers. In many states around the country, municipally-owned electric utilities are already providing these services, where they have the local authority and have not been prohibited by state legislation.

- Municipal electric utilities have private-use restrictions that limit how tax-exempt financing can be used to provide advanced telecommunications services. State public utility commissions, city councils and local utility boards assure that revenues from electric utility services do not provide cross-subsidies to telecommunications services. The decision for a municipal electric utility to provide telecommunications services is no different for a municipality than the decision for the municipality to have a department or authority provide electric, gas, water or wastewater services, or for that matter, education, transportation or infrastructure services.

- Material was distributed by APPA representatives during the meeting to provide background information on the pending petition. It included: a) an issue brief on overcoming anti-competitive state barriers to entry, b) a list of the eight states with barriers to entry, c) copies of four pieces of Congressional correspondence on the matter, d) language from the Conference Committee Report on Section 253(a) (then designated Section 253(b)), e) the summary and overview section from the Missouri municipals petition for preemption, and f) an article from Public Power Weekly about Iowa city referenda determinations on whether to establish telecommunications systems.

In accordance with the Commission's rules governing *ex parte* presentations, I am providing two (2) copies of this letter. Thank you for your consideration.

Sincerely,

Richard B. Geltman
General Counsel

Enclosures

cc: Thomas C. Power
Ellen Blackler
Attached Service List

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Issue Brief

American Public Power Association
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Overcoming Anticompetitive State Barriers to Entry for Municipal Utilities in Telecommunications
April 1999

Summary: For more than a century, public power utilities have played a vital role in furnishing essential local competition in the electric power industry. This competition has kept prices low and quality of electric service high in the communities that operate their own electric utilities. In the absence of barriers to entry, public power utilities can now play a similar role in telecommunications.

Clearly, in enacting the Telecommunications Act of 1996, Congress envisioned that utilities – with their existing internal communications infrastructure – could help to further the goals of competition by providing an alternative means through which new competitive communications services could be offered.

Yet, in an effort to undermine this objective, existing cable TV and local telephone interests are working to prevent municipal utilities from providing telecommunications services within their own communities. In fact, it is clear that cable and local telephone companies are utilizing their vast resources and long-standing relationships with state legislatures to inhibit the development of competition at the state level. In an effort to achieve in the states what they could not obtain at the federal level, they have pushed legislation in eight states to create barriers to entry for municipal utilities in telecommunications. In fact, they have undertaken a coordinated nationwide strategy to undermine the Act in this area – as evidenced by the same anticompetitive legislation being introduced by cable companies in Georgia and Oregon, for example. This unfortunate trend is expected to grow – unless Congress and the FCC make it clear that such statutes are out of step with the intent and language of the Telecommunications Act of 1996.

The FCC has recently been presented with such an opportunity. Several municipalities in the State of Missouri have jointly asked the FCC to override a Missouri State statute which conflicts with the Telecommunications Act by prohibiting the provision of most telecommunications services by municipalities and municipal utilities. A plain reading of the language of the Telecommunications Act, and accompanying report language related to utilities in particular, makes it very clear that this barrier to entry must be nullified. A strong preemptive FCC ruling in this case will effectively bring an end to this ongoing effort to frustrate the goals of the Telecommunications Act of 1996 through enactment of restrictive state statutes – and will reinstate the long tradition of local control that has been the driving principle behind municipal utilities since the inception of the electric industry over a century ago.

through partnerships with private companies, or by outsourcing the provision of these services entirely. It is here that many new market entrants will have the opportunity to bring enhanced competition to many communities. If those who currently control local telephone and cable services are able to successfully inhibit the ability of municipal utilities to provide the means for these new market entrants to provide competitive services, customers will be left with less choice and higher costs. If the goal of Congress and the FCC is to ensure that the benefits of competition flow to consumers– it is clear that municipal utility involvement in telecommunications can only help to achieve and further this end.

Finally, it is important to note that municipal utilities are directly accountable to the communities they serve. Thus, the decisions made by locally-owned utilities reflect the needs and demands of their citizens. Given the importance of telecommunications infrastructure and services to the future of our nation's communities, it is vital that the principle of local control is not eroded by the efforts of the large regional incumbent monopolies who are arguing to take these decisions out of the hands of communities and their locally-elected officials.

APPA Position: The FCC, in implementing the Telecommunications Act of 1996, should resolve all questions of interpretation in ways that would permit and encourage public power systems to become fully engaged in providing telecommunications services or in facilitating the provision of such services by others.

American Public Power Association

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State Barriers to Telecommunications Activities By Public Power Utilities

(As of November 8, 1999)

1. Arkansas prohibits municipal entities from providing local exchange services. (*Ark. Code § 23-17-409*)

2. Florida imposes various taxes to increase the prices of telecommunications services (as distinguished from other services) sold by public entities. (*Florida Statutes §§ 125.421. 166.047, 196.012, 199.183 and 212.08*)

3. Missouri bars municipalities and municipal electric utilities from selling or leasing telecommunications services or telecommunications facilities, except services for internal uses; services for educational, emergency and health care uses; and "Internet-type" services. (*Revised Statutes of Missouri § 392.410(7)*)

4. Minnesota requires municipalities to obtain a super-majority of 65% of the voters before providing telecommunications services. (*Minn. Stat. Ann. § 237.19*)

5. Nevada prohibits municipalities larger than 25,000 from providing "telecommunications services," as defined by federal law. (*Nevada Statutes § 268.086*)

6. Tennessee bans municipal provision of paging and security service and allows provision of cable, two-way video, video programming, Internet and other "like" services only upon satisfying various anti-competitive public disclosure, hearing and voting requirements that a private provider would not have to meet. (*Tennessee Code Ann. § 7-52-601 et seq.*)

7. Texas bars municipalities and municipal electric utilities from offering telecommunications services to the public either directly or indirectly through a private telecommunications provider. (*Texas Utilities Code, § 54.201 et seq.*)

8. Virginia prohibits all localities except the Town of Abingdon (the home of a prominent member of Congress) from offering telecommunications services or facilities, but allows localities to sell the telecommunications infrastructure that they had in place on September 1, 1998, and also allows localities to sell or lease "dark fiber" subject to several onerous conditions. (*Virginia Code § 15.2-1500*)

VIRGIL H. GOODE, JR.
5TH DISTRICT, VIRGINIA

Congress of the United States
House of Representatives
Washington, DC 20515–4605

February 12, 1999

The Honorable William Kennard
Chairman
Federal Communications Commission
1919 M Street, NW
Washington, D.C. 20554-0001

Dear Mr. Kennard,

The Federal Communications Commission (FCC) now has pending before it a very important petition regarding the ability of municipal utilities to provide telecommunications services. The petition, filed by municipally-owned utilities in Missouri (CC Docket No. 98-122) asks that the FCC take action under Section 253 of the Telecommunications Act of 1996. This case has national implications because of similar laws in other states (Texas, Arkansas, Tennessee, Nevada, Minnesota, and Virginia) which restrict municipal utility entry into the telecommunications market.

State prohibitions on telecommunications activities by municipal utilities clearly conflict with the language and intent of Section 253 (a) of the Telecommunications Act of 1996 — which was designed to ensure that "*any entity*" could provide communications services in a newly competitive marketplace.

Approximately 75% of municipal power systems in the U.S. serve cities with populations of less than 10,000 residents. These utilities, just as they brought electrical service to traditionally underserved areas of the country, are now prepared to bring new telecommunications services to their communities. Barring municipal utilities from utilizing their communications infrastructure to provide the telecommunications services will undermine the benefits of local control - and unfairly restrict the availability of services and the development of competition in rural communities throughout the U.S.

I ask that you show every consideration to approve the petition for preemption filed by the municipally-owned utilities in Missouri because of its impact in jurisdictions like Virginia. Thank you again for your consideration and with kind regards, I am

Sincerely yours,

Virgil H. Goode

bcc: Mr. Duane S. Dahlquist

RICK BOUCHER
9TH DISTRICT, VIRGINIA

COMMITTEES:

COMMERCE
SUBCOMMITTEES:
TELECOMMUNICATIONS, TRADE AND CONSUMER PROTECTION
ENERGY AND POWER

JUDICIARY
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March 16, 1999

BRPA
RECEIVED
MAR 0 8 1999
Noted ✓
Refer To: FCC Members, CTS Members, Dick, Nipper, Baller
Filed (A) LEG/FED/KONG. COMM

The Honorable William Kennard
Chairman
Federal Communications Commission
The Portals
445 12th Street, S.W.
Washington, D.C. 20554

Dear Chairman Kennard:

The Commission now has pending before it a petition concerning the ability of local government-owned utility services to provide telecommunications services. The petition, filed by municipally-owned utilities in Missouri (CC Docket No. 98-122), asks that the FCC take action under Section 253 of the Telecommunications Act of 1996 to empower them to offer these services. This case has national implications because of laws in other states (Texas, Arkansas, Tennessee, Nevada, Minnesota, and Virginia) which restrict municipal utility entry into the telecommunications market. I hope that the Commission will, in conformance with all applicable Commission Rules, swiftly approve the petition. In so doing, you will give effect to Section 253 of the Telecommunications Act of 1996.

State prohibitions on telecommunications activities by local governments conflict with the language and intent of Section 253 (a) of the Telecommunications Act of 1996 – which was designed to ensure that "*any entity*" can provide communication services in a newly competitive marketplace. In addition, the conference report accompanying the Act recognized the inclusiveness of the term "*any entity*" by stating that, "*nothing in this section shall affect the ability of a State to safeguard the rights of consumers...However explicit prohibitions on entry by a utility into telecommunications are preempted under this section.*"

In enacting the 1996 Act, Congress envisioned electric utilities, with their existing and soon-to-be constructed modern communications infrastructures, as key participants in the effort to facilitate competition in the telecommunications industry.

Approximately 75% of municipal power systems in the U.S. serve cities with populations of less than 10,000 residents. It is precisely in these smaller communities that the need for the innovative entity of new telecommunications competitors is the greatest due to the general absence of any alternative to the incumbent monopoly providers. Municipal utility entry will in many instances be the only competition available.

I urge you and your Commission colleagues to take immediate steps to eliminate barriers to telecommunications market entry for municipally-owned utilities in accordance with the intent and language of the Telecommunications Act of 1996. As always, I will appreciate your careful review of this matter. With kind regards and best wishes, I remain

Sincerely,

Rick

Rick Boucher
Member of Congress

RB/msr

cc: Commissioner Susan Ness
Commissioner Harold Furchtgott-Roth
Commissioner Michael K. Powell
Commissioner Gloria Tristani

United States Senate

WASHINGTON, DC 20510

March 26, 1999

The Honorable William Kennard
Chairman
Federal Communications Commission
445 12th Street S.W.
Washington, D.C. 20554

Dear Chairman Kennard:

The Federal Communications Commission (FCC) now has pending before it a very important petition regarding the ability of municipal utilities to provide telecommunications services. The petition, filed by municipally-owned utilities in Missouri (CC Docket No. 98-122) asks that the FCC take action under Section 253 of the Telecommunications Act of 1996. This case has national implications because of similar laws in other states (Texas, Arkansas, Tennessee, Nevada, Minnesota, and Virginia) which restrict municipal utility entry into the telecommunications market. In response to this petition, we ask that you take swift action to approve the petition for preemption, and thus bring to an end a growing anti-competitive trend toward the erection of state barriers to entry for municipal utilities.

State prohibitions on telecommunications activities by municipal utilities clearly conflict with the language and intent of Section 253 (a) of the Telecommunications Act of 1996--which was designed to ensure that "any entity" could provide communications services in a newly competitive marketplace. In addition, the conference report accompanying the Act recognized the inclusiveness of the term "any entity" by stating that, "nothing in this section shall affect the ability of a State to safeguard the rights of consumers...however, explicit prohibitions on entry by a utility into telecommunications are preempted under this section."

It is clear that in enacting the Telecommunications Act of 1996, Congress envisioned electric utilities, with their existing communications infrastructures, as key players in the effort to facilitate competition in the telecommunications industry. Their communications networks and facilities often provide an alternative source of access for the new entrants we depend upon to bring new services and increased competitiveness to the industry.

In addition, approximately 75% of municipal power systems in the U.S. serve cities with populations of less than 10,000 residents. These utilities, just as they brought electrical service to traditionally under-served areas of the country, are now prepared to bring new telecommunications services to their communities. Barring municipal utilities from utilizing their communications infrastructure to provide the telecommunications services will undermine the benefits of local control and unfairly restrict the availability of services and the development of competition in rural communities throughout the U.S.

In order for widespread competition to develop effectively in the telecommunications industry, we must preserve local control and decision-making, effectively utilize existing utility infrastructure, and ensure that all parts of the country and all customers can enjoy the benefits of advanced telecommunications technology. We urge you to take immediate steps to eliminate barriers to entry for municipal utilities in accordance with the vision, intent and language of the Telecommunications Act of 1996.

Sincerely,

J. Robert Kerrey

Paul Wellstone

Tom Harkin

John Kerry

Byron Dorgan

EDWARD J. MARKEY
7TH DISTRICT, MASSACHUSETTS

COMMERCE COMMITTEE
RANKING MEMBER
SUBCOMMITTEE ON
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AND CONSUMER PROTECTION
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April 20, 1999

The Honorable William E. Kennard
Chairman
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20024

Dear Chairman Kennard:

We are writing to express our concern about the growing trend toward enactment of state barriers to entry for municipal utilities in telecommunications. In our view, State barriers to entry for municipal utilities have the effect of shutting the door on an important participant in providing greater telecommunications competition and consumer choice.

Congress approved Section 253 during consideration of the Telecommunications Act of 1996 in order to enable "any entity", without qualification, to provide communications services. Moreover, the related conference committee report explains that "explicit prohibitions on entry by a utility into telecommunications are preempted under this section." A number of statutes at the State level would appear to thwart congressional intent to encourage utility involvement in the telecommunications industry.

In enacting the Telecommunications Act, Congress recognized that utility infrastructure would provide valuable new opportunities through which new market entrants could enter the telecommunications marketplace. In fact, this goal has already been realized in many cities across the country where the municipal utility has teamed up in partnership with a private company to provide communications services in their community.

The Commission now has pending before it a petition, filed by the municipally-owned utilities in the State of Missouri. This petition requests that the Commission fully implement Section 253 of the Act by preempting the restrictions imposed on the provision of communications services by municipal utilities in Missouri.

We strongly urge you to consider approving the Missouri municipals' petition for preemption consistent with Section 253 of the Act. We believe that doing so will allow municipal utilities to advance the pro-competitive and pro-consumer policies the Congress envisioned for such entities when it successfully legislated.

Thank you in advance for considering our views with respect to this matter. If you have any questions please do not hesitate to contact us.

Sincerely,

Joe Moakley
Member of Congress

Edward J. Markey
Member of Congress

Barney Frank
Member of Congress

remove all barriers to entry in the provision of telecommunications services.

Subsection (a) of new section 254 preempts any State and local statutes and regulations, or other State and local legal requirements, that may prohibit or have the effect of prohibiting any entity from providing interstate or intrastate telecommunications services.

Subsection (b) of section 254 preserves a State's authority to impose, on a competitively neutral basis and consistent with universal service provisions, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers. States may not exercise this authority in a way that has the effect of imposing entry barriers or other prohibitions preempted by new section 254(a).

Subsection (c) of new section 254 provides that nothing in new section 254 affects the authority of States or local governments to manage the public rights-of-way or to require, on a competitively neutral and nondiscriminatory basis, fair and reasonable compensation for the use of public rights-of-way, on a nondiscriminatory basis, provided any compensation required is publicly disclosed.

Subsection (d) requires the Commission, after notice and an opportunity for public comment, to preempt the enforcement of any State or local statutes, regulations or legal requirements that violate or are inconsistent with the prohibition on entry barriers contained in subsections (a) or (b) of section 254.

Subsection (e) of new section 254 simply clarifies that new section 254 does not affect the application of section 332(c)(3) of the Communications Act to CMS providers.

Section 309 adds a new section 263 to the Communications Act and is intended to permit States to adopt certain statutes or regulations regarding the provision of service by competing telecommunications carriers in rural markets. Such statutes or regulations may be no more restrictive than the criteria set forth in section 309. The Commission is authorized to preempt any State statute or regulation that is inconsistent with the Commission's regulations implementing this section.

House amendment

The House provisions are identical or similar to subsections 254(a), (b) and (c). The House amendment does not have a similar provision (d) requiring the Commission to preempt State or local barriers to entry, if it makes a determination that they have been erected.

Conference agreement

The conference agreement adopts the Senate provisions.

New section 253(b) clarifies that nothing in this section shall affect the ability of a State to safeguard the rights of consumers. In addition to consumers of telecommunications services, the conferees intend that this includes the consumers of electric, gas, water or steam utilities, to the extent such utilities choose to provide telecommunications services. Existing State laws or regulations that reasonably condition telecommunications activities of a monopoly utility and are designed to protect captive utility ratepayers from the potential harms caused by such activities are not preempted under this section. However, explicit prohibitions on entry by a

utility into telecommunications are preempted under this section.

The rural markets provision in section 309 of the Senate bill is simplified and moved to this section. The modification clarifies that, without violating the prohibition on barriers to entry, a State may require a competitor seeking to provide service in a rural market to meet the requirements for designation as an eligible telecommunications carrier. That is, the State may require the competitor to offer service and advertise throughout the service area served by a rural telephone company. The provision would not apply if the rural telephone company has obtained an exemption, suspension, or modification under new section 251(f) that effectively prevents a competitor from meeting the eligible telecommunications carrier requirements. In addition, the provision would not apply to providers of CMS.

New Section 254 - Universal Service

Senate bill

Section 103 of the bill establishes a Federal-State Joint Board to review existing universal service support mechanisms and make recommendations regarding steps necessary to preserve and advance this fundamental communications policy goal. Section 103 also adds a new section 253, entitled "Universal Service," to the Communications Act. As new section 253 explicitly provides, the Senate intends that States shall continue to have the primary role in implementing universal service for intrastate services, so long as the level of universal service provided by each State meets the minimum definition of universal service established under new section 253(b) and a State does not take any action inconsistent with the obligation for all telecommunications carriers to contribute to the preservation and advancement of universal service under new section 253(c).

Section 103(a) of the bill requires the Commission to institute a Federal-State Joint Board under section 410(c) of the Communications Act to recommend within 9 months of the date of enactment new rules regarding implementation of universal service.

Section 103(a) also provides that at least once every four years the Commission is required to institute a new Joint Board proceeding to review the implementation of new section 253 regarding universal service, and to make recommendations regarding any changes that are needed

Section 103(b) of the bill requires the Commission to complete any proceeding to implement the recommendations of the initial Joint Board within one year of the date of enactment of the bill, any other Joint Board on universal service matters within one year of receiving such recommendations

Section 103(c) of the bill simply clarifies that the amendments to the Communications Act made by the Senate bill do not necessarily affect the Commission's existing separations rules for local exchange or interexchange carriers. However, this subsection does not prohibit or restrict the Commission's ability to change those separations rules through an appropriate proceeding.

Section 103(d) establishes new section 253 in the Communications Act. New section 253(a) establishes seven principles on which the Joint Board and the Commission shall base policies for the preservation and advancement of universal service.

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
The Missouri Municipal League;	)	
The Missouri Association of Municipal Utilities;	)	
City Utilities of Springfield;	)	
City of Columbia Water & Light;	)	CCBPol 98 - _____
City of Sikeston Board of Utilities.	)	
Petition for Preemption of	)	
Section 392.410(7) of the	)	
Revised Statutes of Missouri	)	

PETITION FOR PREEMPTION

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Lana L. Meller
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Attorneys for the
Missouri Municipals

July 8, 1998

OVERVIEW AND SUMMARY

As Chairman Kennard has observed, one of the main purposes of the Telecommunications Act is to eliminate all barriers that prevent consumers from choosing providers "from as wide a variety of providers as the market will bear."[1] Similarly, Senate Majority Leader Trent Lott has noted that the "primary objective" of the Telecommunications Act is to establish a "framework where everybody can compete everywhere in everything."[2] Judged by these standards, HB 620 is a thoroughly bad law. Unless the Commission preempts it, HB 620 will impede the development of effective local competition in Missouri for years. It will deny communities throughout the State a fair chance to obtain prompt and affordable access to the benefits of the Information Age. It will constrict economic growth, educational opportunity and quality of life, particularly in rural areas. It will thwart attainment of universal service goals of the Telecommunication Act by reducing both the number of potential service providers and the number of contributors to universal service support mechanisms. It will also disturb the competitive balance between public and private providers of electric power that has served Missouri well for decades.

The Missouri Municipals recognize that the Commission has declined to preempt a Texas law that prohibits municipalities and municipal electric utilities in Texas from engaging in telecommunications activities.[3] In that case, which was decided shortly before four of the five current commissioners took office, the prior Commission determined that the term "any entity" in Section 253(a) of the Act does not apply to municipalities that do not operate electric utilities.

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1 *Statement of William E. Kennard Before the Senate Subcommittee on Antitrust, Business Rights, and Competition* (March 4, 1998), Attachment A.

2 Statement of Senator Trent Lott (R-MS), June 7, 1995, Congressional Record at S.7906, Attachment B.

3 *In the Matter of the Public Utility Commission of Texas*, FCC 97-346, (rel. Oct. 1, 1997) ("*Texas Order*"), petition for review pending in *City of Abilene, TX, and the American Public Power Association v. Federal Communications Comm'n*, Case Nos. 97-1633 and 97-1634 (D.C. Cir.).

express statements to that effect in the Senate report discussing the preemption provision that ultimately became Section 253(a).

Several new developments reinforce the conclusion that the *Texas Order* was incorrect. First, the United States Court of Appeals for the District Columbia Circuit has recently issued two decisions that undermine the Commission's rationale in the *Texas Order*. In *Alarm Industry Communications Committee v. Federal Communications Comm'n*, 131 F.3d 1066, 1069-70 (D.C. Cir. 1997), the court struck down the Commission's narrow interpretation of the term "entity" in Section 275 of the Act, finding that "entity" is typically defined very broadly in common, non-technical dictionaries and that the Commission failed to interpret that term with due regard for the Act's underlying policies. The court also refused to afford the Commission's interpretation deference, finding that it "reflect[ed] no consideration of other possible interpretations, no assessment of statutory objectives, no weighing of congressional policy, no application of expertise in telecommunications." *Id.* Similar considerations apply here.

Second, in *Bell Atlantic Telephone Companies v. Federal Communications Comm'n*, 131 F.3d 1044 (D.C. Cir. 1997), the court found that, in determining the "plain" meaning of a statute, the Commission must perform a thorough analysis that exhausts all of the traditional tools of statutory construction, including the language, structure, legislative history and purposes of the Act. *Id.* at 1047. The Commission cannot simply scan the Act and its legislative history in search of an "express" statement of legislative intent, as the Commission has recently admitted that it did in deciding the *Texas* case.[4]

The Commission has itself made numerous statements in recent months that are inconsistent with the *Texas Order*. For example, in one order, the Commission held that Congress's use of the term "any" in the Telecommunications Act deprives the Commission of

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[4] In a recent letter to Congress, Chairman William Kennard, who was general counsel of the Commission at the time that it issued the *Texas Order*, confirmed that the Commission had looked for an "express" statement of legislative intent (Attachment C hereto).

efforts -- as Congress intended -- only by issuing clear, forceful and unequivocal orders preempting measures such as HB 620.

Finally, as the Commission recognized in the *Texas Order*, Congress gave it extraordinarily broad authority to preempt state and local barriers to entry:

> [S]ection 253 expressly empowers -- indeed, obligates -- the Commission to remove any state or local legal mandate that "prohibit[s] or has the effect of prohibiting" a firm from providing any interstate or intrastate telecommunications service. *We believe that this provision commands us to sweep away not only those state or local requirements that explicitly and directly bar an entity from providing any telecommunications service, but also those state or local requirements that have the practical effect of prohibiting an entity from providing service*. As to this latter category of indirect, effective prohibitions, we consider whether they materially inhibit or limit the ability of *any competitor or potential competitor* to compete in a fair and balanced legal and regulatory environment.

Texas Order, ¶ 22 (emphasis added). Yet, even though it could not find even one word in the language or legislative history of the Act to support its position, the Commission attributed to Congress an intent to deny public entities the benefits of this broad mandate. Thus, the Commission essentially made policy for Congress – which the Commission had no authority to do. The Commission should now rescind that decision and enforce Section 253 as written.

Over three years, more than two dozen cities in Iowa vote to set up their own telecommunications systems

Fashion trends may begin on the coasts, but the more important groundswells of public opinion often start in the heartland. The Iowa presidential primaries are viewed as harbingers for the full election to come. Test marketers and focus group organizers go to the Midwest to learn how the American public as a whole will respond to their product.

Now a new trend is gaining momentum in Iowa, where, over the past three years, voters have overwhelmingly approved the formation of city-owned telecommunications businesses. In most of these cases, the city has a municipal electric utility that will run the new communications operation. In 32 separate votes since 1994—14 held last November—only two public power utilities were denied voter approval to establish a telecommunications system that could provide cable television, data transmission and even local telephone service. More than a third of the time, the measures were approved by majorities of 90% or more.

Why this turn to government to provide services usually offered through the private sector? According to the Iowa Association of Municipal Utilities, there are four common factors that influence voters on this issue: dissatisfaction with current service; the hope of economic development; a desire to improve local educational opportunities; and preparation by city electric and gas utilities for competition in those industries.

For Muscatine, an upsurge of dissatisfaction with private providers is part of its history. The residents of this Mississippi River town founded the public power utility in 1900 because they were unhappy with the service they received from privately owned water and electric utility companies. Recently, their disfavor focused on the company providing telecommunications services.

Gary Weiskamp, manager of public relations and utility services for Muscatine Water & Power, explained, "Last year [in 1996], we were approached by a task force that included members of the Chamber of Commerce and the local development council about providing telecommunications services. They told us their needs were simply not being met by the present providers of telephone service and cable television."

In response, the public power utility hired a consulting firm to conduct a feasibility study and a polling group to do a market analysis. The results of both projects showed Muscatine that pursuing the development of telecommunications was both possible and desired by the town's citizens. The utility board of trustees asked the city council to hold a referendum on the issue.

That referendum, held this past summer, yielded an astonishing 94% approval from the voters of Muscatine for the utility to establish a municipally owned broadband cable system, and for the operation of the system to be governed by the utility board of trustees.

The utility's board of trustees approved a business plan for the new venture in October and Muscatine should be able to offer "some limited service" by next September, Weiskamp said. Those services could range from local and long distance telephone service to two-way data communications, cable TV, and a municipal area network that would make it possible for the utility to provide businesses in its heavily industrial area with direct two-way voice and data transmission between separate sites.

Like the citizens of Muscatine, residents of Spencer approached the public power utility about getting into the telecommunications business. "We told the citizens that they had to lead the drive to establish a telecommunications system, that it had to come from the desires of the people rather than the utility itself," Spencer Municipal Utilities Manager Neal Drefke explained. "They went to the City Council and utility board to ask if we would run a telecommunications utility if the city's residents voted to create one. The council and board said yes, so then the citizens went out and got the votes."

City/Year	Vote
Cedar Falls '94	70%
Hull '94	97%
Sibley '94	91%
Hawarden '94	96%
Grundy Center '96	93%
Manning '96	86%
Laurens '97	99%
Alta '97	88%
Lake View '97	84%
Danbury '97	90%
Hartley '97	86%
Indianola '97	58%
Orange City '97	84%
Sac City '97	77%
Tipton '97	86%
Westwood '97	91%
Akron '94	91%
Rock Rapids '94	83%
Bancroft '94	85%
Harlan '95	71%
Coon Rapids '96	87%
New London '96	77%
Spencer '97	91%
Muscatine '97	94%
Algona '97	74%
Denison '97	54%
Independence '97	57%
Mount Pleasant '97	64%
Primghar '97	90%
Sanborn '97	97%
Vinton '97	48%
Greenfield '97	42%

Election results: city-owned cable systems were approved in 30 of 32 referendums. In 12 of these elections, the margin was 90% or more. *Source: Iowa Association of Municipal Utilities*

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The group spearheading the drive got those votes in the face of an aggressive campaign mounted by the private cable television provider to vote down the proposal. Although the private company outspent the local citizens group that supported the ballot measure by a margin of 130 to 1, 91% of Spencer's citizens voted to create a new city-owned system.

Drefke attributes the victory not only to dissatisfaction with cable service, but also to a growing fear in Iowa over the potential loss of local control. "US West has sold some of its local telephone exchanges here," Drefke noted. "People are very concerned about losing the ability to speak with someone locally about problems, about the '1-800-Who Cares?' mentality that can happen when a service provider doesn't have a local presence."

And, Drefke said, Iowans in general have a high opinion of, and trust in, their local utilities. "Our ballot had two questions—whether the city should create a telecommunications system, and whether the municipal utility should run it. We had some people vote no on the first question, but yes on the second. They were saying that if we did decide to go forward, we should at least have a trusted local entity running the business. That shows a high level of trust."

In some situations, establishing a locally owned telecommunications system is the only way to get service at all. The public power utility in Primghar serves 568 customers. Primghar joined forces with the neighboring town of Sanborn in 1981 to set up a coaxial cable system so its citizens could have cable television. No private company was interested in serving such a small community. Primghar's utility Superintendent Merle Negus said the vote held there on Nov. 4, which was approved by 90% of the voters, was required to empower the city to improve the system. "State law changed, so we had to get voter approval before we could finance any upgrading of our cable system," Negus said. These communities, along with nearby Hartley, are now studying the feasibility of upgrading to a hybrid coaxial-fiber optic system, Negus said.

Founders of the municipal electric utility in Muscatine, above, were unhappy with the service they were getting from private companies nearly 100 years ago. Dissatisfaction with cable service led to the town's decision to create its own communications utility. *Photo courtesy of Muscatine Water & Power*

Where public power utilities have established their own telecommunications systems, the competition seems to be having a positive effect, according to IAMU. Private cable giant Tele-Communications Inc. now offers Harlan residents 35-channel extended basic service for just $16.95 per month, $2 less than the cost of the city's 43-channel service. Some city customers have been offered every third month free for switching back to TCI for a year. By contrast, TCI service in neighboring communities can cost more than $25 per month. Also, new service connections are free in Harlan, but cost nearly $45 in neighboring towns served by TCI.

Among the most important factors driving public power utilities to offer telecommunications service are competitive positioning and economic development. Drefke said Spencer is designing a system that could provide not only cable TV but also local telephone, high-speed data transmission, security systems and more. "We'll have to look carefully at what is feasible, based on costs and the number of potential customers," he explained. "But just as we've heard about distance learning, we're now beginning to see distance working—people moving away from large cities to small towns, and needing technology services that are better than those the larger cities provide." That trend can work in favor of smaller towns where public power utilities are capable of providing those services. "We even have to think about building a system that we can upgrade later to provide services that haven't even been invented yet," Drefke said.

Muscatine's Weiskamp concurs. "If we can offer a package of services—water, electricity and communications—then in my opinion, we're in the driver's seat" in a deregulated environment, he said. ■